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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

No. 612

CLARESA F. ARMSTRONG BROWN,
Petitioner,

vs.

COMMERCIAL NATIONAL BANK OF PEORIA,
AS TRUSTEE, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

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THE BUNTHORP-WARREN PRINTING COMPANY, CHICAGO

IN THE

Supreme Court of the United States

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COMMERCIAL NATIONAL BANK OF PEORIA,
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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Illinois in the above entitled case entered on 17 July, 1969.

CITATIONS TO OPINIONS BELOW.

The opinion of the Supreme Court of Illinois is reported in 42 Ill. 2d 365 and is printed in the appendix hereto at A1. The opinion of the appellate court appears in 94 Ill. App. 2d 273.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257 (3).

The question presented was raised in the Illinois Supreme Court at the earliest possible time, to wit, in the petition for reconsideration of its order denying petitioner's motion for a rehearing, as more fully appears from the *Statement of the Case* herein. In any event, the question was passed on by the Illinois Supreme Court when it denied petitioner's motion on 17 July, 1969, as will also appear more fully from the *Statement of the Case* herein.

QUESTION PRESENTED FOR REVIEW.

Whether petitioner was denied due process of law when three justices of a state supreme court held undisclosed corporate offices that gave them an interest in the outcome of this case, and the state court established a novel rule of law that would promote the interests of the justices' corporations?

CONSTITUTIONAL PROVISION INVOLVED.

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . ." *Amendment Fourteen, §1, of the Constitution of the United States.*

STATEMENT OF THE CASE.

This was an action brought to set aside three irrevocable trusts secured by a bank from a senile 85 year old woman who did not understand the trusts, had no competent independent adviser, and entered into the transaction entirely at the instance of the bank, which admitted having a prior fiduciary relation toward her. (App. A14, A21-2, A22-26, A9-10, A13-14) The theory of the case was that, under such circumstances, the bank breached its fiduciary obligation to her. The court laid down the doctrine, never before suggested by any court of last resort, that the bank was exempt from its fiduciary obligations because its only gain was its fees.* (App. A4-5)

The opinion of the court was written by a justice who, as a director and stockholder of a bank, had an obligation to promote the interests of his bank, and thus had an interest in promulgating a rule of law favorable to banks. Two other justices of the court, as directors and stockholders of banks, had the same conflicting interests. The overreaching by the bank, sanctioned by the court's opinion, is detailed in the Petition for Rehearing. (App. A9)

The fact of the justices' directorships was not disclosed to the petitioner or her counsel and they had no knowledge of it until after rehearing was denied on 27 May, 1969. (App. A32-33) It became known to them only through the following circumstances:

On 10 June, 1969, a document was filed in another case in the Supreme Court of Illinois charging that the justice who wrote the opinion in that case had accepted from a litigant a gift of bank stock worth $2,000. (App. A32) On

* Under the terms of the trusts, the bank was permitted to fix its own fees. On the basis of its fees already charged these would amount to something over $200,000 in the years that the trusts would endure. (App. A10)

12 June, 1969, the House of Representatives of the State of Illinois adopted a resolution to investigate these charges and on 17 June, 1969 the Supreme Court of Illinois appointed a commission to investigate them.* (App. A32)

Through these investigations, petitioner learned for the first time that three justices of the Supreme Court of Illinois were, at the date of the opinion, directors and stockholders of banks. (App. A32-33) On 8 July, 1969, petitioner presented her motion, affidavit and memorandum of authorities to a justice of the Supreme Court of Illinois setting out these facts. (App. A30-36) Petitioner alleged that under these circumstances, in the light of prior decisions of this Court, the opinion herein denied petitioner due process of law as guaranteed to her by the 14th Amendment. (App. A30, 34-36) On that sole ground, petitioner moved the court to reconsider its order denying her petition for rehearing. The justice of the Supreme Court of Illinois, to whom this motion was presented, referred it, by an order, to the full court for disposition. (App. A37) Briefs were filed by both sides and on 17 July, 1969, that court considered and denied petitioner's motion. (App. A38) At the same time, on Petitioner's motion, the court recalled and stayed its mandate pending the disposition by this Court of this petition for certiorari. (App. A38)

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* Ultimately, on 31 July, 1969, the commission appointed by the Supreme Court of Illinois reported to the court that two justices of that court had been guilty of judicial impropriety in accepting gifts of bank stock from a litigant and should resign, which they promptly did. One of them was the justice who wrote the opinion in this case. (See certified copy of Report of Commission filed with Record herein.)

REASONS FOR GRANTING THE WRIT.

1. The decision below conflicts with the principles announced in other judicial conflict-of-interest cases decided by this Court.

At the last term, this Court on certiorari reversed a court of appeals and a district court in a civil conflict-of-interest case where the alleged potential bias was less evident than in the case at bar. (*Commonwealth Coating Corp.* v. *Continental Casualty Co.*, 393 U. S. 145.) Both lower courts had confirmed a unanimous arbitration award, against the charge (discovered only after the award) that the third arbitrator had, more than a year prior to his appointment, occasionally been employed and paid as a consultant by one of the litigants. This Court said:

> "We have no doubt that if a litigant could show that a foreman of a jury or a judge in a court of justice had, unknown to the litigant, any such relationship, the judgment would be subject to challenge . . . in the case of courts this is a *constitutional* principle [the Court's italics] . . . any tribunal permitted by law to try cases and controversies must not only be unbiased but must avoid even the appearance of bias." (pp. 148, 150)

In a recent case, this Court issued a writ of certiorari to a state court and reversed its judgment on the ground that the judge's possible emotional interest in the decision, as the instigator of the case, made it a violation of due process of law for him to sit in judgment on the case. (*In re Murchison*, 1955, 349 U. S. 133.) We do not suggest an analogy on the facts, but the principles announced by the Court at that time are clearly applicable to this case:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of

law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.' *Tumey* v. *Ohio,* 273 U. S. 510, 532. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' " (p. 136.)

The *Tumey* case, to which this Court referred in *Murchison* had unanimously held that the likely desire of a village Mayor to improve the financial condition of his village by the fines he imposed as a judge deprived the litigants before him of due process of law. The indirect financial interest in *Tumey* is more closely analogous to the facts in the case at bar. This Court said in *Tumey*: "With his interest as mayor in the financial condition of his village and his responsibility therefor, might not a defendant with reason say that he feared that he could not get a fair trial or a fair sentence from one who would have so strong a motive to help his village." 273 U. S. at 533.

The Court of Appeals for the 9th Circuit recognized these principles in *In re Honolulu Consolidated Oil Co.,* 1917, 243 Fed. 348, when it invoked the extraordinary remedy of mandamus to compel a district court judge to disqualify himself where he had no direct interest in the case then at bar but owned stock in another corporation that might be involved in similar litigation.

2. The question presented is one of widespread effect and of fundamental importance to the administration of justice in the state and federal courts of this country.

The questions presented here have national scope. In several states, judges of state and federal courts are directors and stockholders of banks. Public records in the office of the Federal Deposit Insurance Corporation reveal that certain judges are directors and stockholders of banks in Connecticut, Massachusetts, Michigan, New Jersey, New York, Pennsylvania, South Carolina, Virginia, Louisiana and Illinois. Two of the three judges of the Illinois appellate court that passed upon the case at bar were directors and stockholders of banks and one of them was the chairman of the board of a bank.

The potential conflicts of interest resulting from such directorships have been recognized by agencies of both the national and state governments. In 1963, the Judicial Conference of the United States passed a resolution that no federal judge "shall serve in the capacity of an officer, director, or employee of a corporation organized for profit." (Reports of the Proceedings of the Judicial Conference of the United States for 1963, p. 62.) The Judicial Conference did not provide, as it could not provide, sanctions to make this admonition effective. In the light of the problem of separation of powers, there is a question whether any means for policing such a rule exists except through decisions of the courts. (See Hearings before the Subcommittee on Separation of Powers, of the Senate Committee on the Judiciary, July 14-16, 1969.)

In 1967, the Illinois legislature enacted a statute forbidding any judge to serve "as an officer or director of any business corporation or other for profit corporation." (Illinois Rev. Stat. 1967, Ch. 37, § 160.11.) This Act is not to take effect until 1 January, 1971 and, in any event, con-

tains no penalty for violation. Exhaustive research does not disclose that such a law has been passed in any other state.

The hazards of judges serving as bank directors is increased by the explosion in the growth of bank trusts in the past decade. In 1958 assets held in trust by United States banks amounted to 49.7 billion dollars. At the end of 1967 this figure had reached 250 billion. (COMMERCIAL BANKS AND THEIR TRUST ACTIVITIES: EMERGING INFLUENCE ON THE AMERICAN ECONOMY, 1968, United States House Committee on Banking and Currency, pp. 1, 802.) The devolution of property from one generation to another is passing out of the probate courts and into bank trusts. From these developments it is fair to assume that much litigation will hereafter arise throughout the country involving bank trusts. It is important that this Court settle the question of the qualification or disqualification in such cases of judges who are also directors and stockholders of banks.

CONCLUSION.

Public confidence in the courts has been shattered by the events of the past year. The bench and the bar must strive to restore that confidence. No better opportunity to perform that service will occur than exists in the case at bar.

Petitioner respectfully requests this Court to issue its writ of certiorari to review the judgment of the court below in order to reverse it and remand the case for disposition by an unbiased court.

Respectfully submitted,

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APPENDIX A.

Docket No. 41515—Agenda 32—January, 1969.

CLARESA F. ARMSTRONG BROWN, Appellant *vs.* COMMERCIAL NATIONAL BANK OF PEORIA, *et al.*, Appellees.

MR. JUSTICE KLINGBIEL delivered the opinion of the court:

The Commercial National Bank of Peoria, as trustee, filed a complaint in the circuit court of Peoria County seeking approval of its accounts and investment policy with respect to two irrevocable trusts established in 1962 by Clara K. Meyer, since deceased. A counterclaim was filed by her daughter, Claresa Armstrong Brown, the principal beneficiary under one of the trusts. The counterclaim seeks to set aside both trusts together with a third one made in 1960, on the ground of undue influence on the part of the bank. After extensive hearings a decree was entered dismissing the counterclaim and approving the trustee's reports. The decree was affirmed by the appellate court (94 Ill. App. 2d 373), and we have allowed the daughter's petition for leave to appeal from the appellate court's judgment. The sole question is whether the circuit court erred in refusing to set aside the trusts.

The settlor, 85 years of age when the 1962 trusts were set up, had been divorced from her husband in 1933 and never remarried. She had two children: Richard, born in 1909, and Claresa, the appellant, born in 1916. Richard had four children, while Claresa had none. The 1960 trust was set up primarily for the settlor's grandchildren, and the two

1962 trusts were created for Richard and Claresa respectively. Under Richard's trust he was to receive the income for life, with the corpus to be distributed on his death to his descendants. Claresa's trust provided for one-half the income to be paid to her, and the remaining half to be paid her in the trustee's discretion, should she require it, with a power of appointment in her over any portions of the income accumulated. The corpus was payable after her death to her children if any and if none then to Richard's children. The trust also provided for a lump sum payment of $50,000 as Claresa should desire, and this sum in fact was paid to her shortly thereafter when she purchased a co-operative apartment in Chicago, where she resided.

The evidence shows the settlor to have been a capable woman in the management of business affairs, having long experience in dealing with her stocks and other investments. She was an active director of the Central National Bank until its consolidation with the appellee bank in 1961. For many years her legal matters were handled by Attorney John Elliott, who was paid an annual retainer. In 1959 she discussed with Frank Mayne, vice-president of the bank, the question of making gifts in trust and she told him she wanted to create a trust for her grandchildren. Several conferences followed in which her attorney Elliott participated, and on January 7, 1960, the trust was executed by the settlor in the presence of both Elliott and Mayne.

In the summer of 1961 the settlor discussed with Mayne the matter of gifts in trust to her son and daughter, and several alternative plans were prepared by the bank. At that time she decided to employ Attorney Boyd Goldsworthy who had long known the son Richard and had done legal work for him through the years to draw the trusts.

The documents were completed by November and sent to the settlor to study them. She gave them to both Claresa and Richard to examine and discuss, and on January 15, 1962, some six months after they were first discussed, the settlor signed them, in the presence of Mayne and Goldsworthy. The settlor died February 19, 1964, of arteriosclerosis. The appellant had received benefits from her trust for some two years after it was created but in April of 1963 began to question the bank's investment policy. Her demands for a change of investments became so insistent that on November 20, 1964, the bank filed its complaint herein to have its actions confirmed.

In support of her counterclaim to have the trusts set aside the appellant argues that a fiduciary relationship existed between the bank and the settlor, that the latter was in a senile condition and did not understand the trusts, and that the bank "secured" the trusts through a presumed exercise of undue influence. It is asserted that the settlor did not have independent advice in private, and the proposition is advanced that in order to avoid a finding of undue influence under the present circumstances it must be shown that the donor privately consulted a competent, independent adviser.

We are aware of no rule of law which deems the transfer fraudulent whenever there has been no private consultation with an independent adviser. Whether the settlor had independent legal advice is merely one of several factors which may be important in determining the fairness of a transfer. The correct rule, where a fiduciary relationship exists, is that a transfer will be deemed presumptively fraudulent when the dominant party has profited at the expense of the dependent party. (*Boryca* v. *Parry,* 24 Ill. 2d

320.) In such cases the fiduciary has the burden of proving the transaction was fair and did not proceed from undue influence. (*Turner* v. *Black,* 19 Ill. 2d 296.) And as we have heretofore pointed out "Important factors in determining whether a particular transaction is fair include a showing by the fiduciary: (1) that he made a free and frank disclosure of all the relevant information he had; (2) that the consideration was adequate; and, (3) that the principal had competent and independent advice before completing that transaction." *Works* v. *McNeil,* 1 Ill. 2d 47, 52.

In the case at bar it is undisputed that the only gain or benefit to be realized by the trustee is its fee for administering the trust, and the first question that arises is whether this kind of "benefit" is sufficient to give rise to the presumption. The law in this State is that under such circumstances there is no presumption. The mere fact that an attorney or confidential agent who writes the will is named executor and trustee, to be compensated as such, does not alone raise a legal presumption of undue influence. He must receive a substantial benefit as a legatee or beneficiary. (*Turner* v. *Black,* 19 Ill. 2d 296; *Gilbert* v. *Oncale,* 371 Ill. 427.) In *Compher* v. *Browning,* 219 Ill. 429, the confidential agent of an aged testatrix drew her will, or procured it to be drawn, and was made an executor and trustee thereunder. It was held (219 Ill. at 438-439) that the rule under which undue influence is inferred from a confidential relation has no application where the fiduciary takes nothing under the will, but was merely to be compensated for his services as such. He is not to be regarded as taking beneficially within the meaning of the rule but only as accepting duties thereunder. Where the fiduciary is benefited by the transaction he has the burden of showing its fairness, but

if he merely drafts the instruments and is to act as trustee, the presumption does not apply. The party seeking to set aside the instruments must prove by a preponderance of the evidence that it was in fact the result of undue influence. *Williams* v. *Ragland,* 307 Ill. 386.

This the appellant has failed to do. Her claim that the trusts were "procured" by the bank out of self-interest finds no support whatever, nor are the repeated references to the settlor as a "senile donor" substantiated by the evidence. Her physical and mental condition described by some 28 witnesses, including her family physician, social friends, employees and fellow board members of the bank, and others was found adequate to enable her to understand the trusts, and such finding is amply sustained by the testimony. It is not necessary that a person setting up a trust be able to explain every technical term used in the instrument. *Pernod* v. *American Nat. Bank & Trust Co.,* 8 Ill. 2d 16, 21.

Other points which appellant seeks to make are also without merit. Despite counsel's urging to the contrary, there is little evidence from which it could be inferred that the attorney Goldsworthy represented anyone other than the settlor, who was billed for his services and paid the fee. And as the trial court expressly found, there is nothing to show that a conspiracy or plan existed on the part of the son, Goldsworthy and Mayne to cause the dismissal of Elliott as Mrs. Meyer's attorney.

There is no need to unduly extend this opinion by discussing evidence item by item, as the parties have largely done throughout almost 400 pages of brief and argument. It is clear on this record that the basic idea for these trusts

was initiated by the settlor, not by the trustee, and she established them only after deliberation and study over an extended period of time. Moreover there is nothing whatever to indicate she subsequently expressed dissatisfaction with any of them.

The trial court heard the evidence in this case, embodied in over 2000 pages of testimony and several hundred exhibits, and its conclusions were unanimously sustained by the appellate court. It is a well-established rule, too familiar to need citations, that where a case is heard by the chancellor and the evidence is oral, entirely or in part, his decree will not be reversed unless it is against the manifest weight of the evidence, or unless there is clear and palpable error in some other respect. The trial court having heard and observed the witnesses is in a better position than is a court of review to decide what weight should be given their respecive testimony.

The Third District Appellate Court was correct in affirming the decree, and its judgment will be affirmed accordingly.

JUDGMENT AFFIRMED.

APPENDIX B.

No. 41515

IN THE

Supreme Court of Illinois

CLARESA F. ARMSTRONG BROWN, *Defendant, Cross-Complainant, Counterclaimant, Appellant and Cross-Appellee,* *vs.* **COMMERCIAL NATIONAL BANK OF PEORIA, a National Banking Association, as Trustee, etc., et al.,** *Plaintiff, Cross-Defendants, Appellees and Cross-Appellants.*	Appeal from the Appellate Court of Illinois, Third District, There Heard on Appeal from the Circuit Court of the 10th Judicial Circuit of Illinois, Peoria County, General Division 11. Honorable **Robert E. Hunt,** Trial Judge Presiding.

PETITION FOR REHEARING.

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SUMMARY.

We suggest that the language of this opinion will, in effect, issue a judicial license to banks in a fiduciary position to secure Irrevocable Trusts from aged persons without affording the donor the protection that the law has always given to such donors. We suggest that this language will arise to plague this Court in future cases.

IN THE

Supreme Court of Illinois

CLARESA F. ARMSTRONG BROWN, *Defendant, Cross-Complainant, Counterclaimant, Appellant and Cross-Appellee,* *vs.* **COMMERCIAL NATIONAL BANK OF PEORIA, a National Banking Association, as Trustee, etc., et al.,** *Plaintiff, Cross-Defendants, Appellees and Cross-Appellants.*	Appeal from the Appellate Court of Illinois, Third District, There Heard on Appeal from the Circuit Court of the 10th Judicial Circuit of Illinois, Peoria County, General Division 11. — Honorable **Robert E. Hunt,** Trial Judge Presiding.

PETITION FOR REHEARING.

Appellant moves for a rehearing and states the points overlooked or misapprehended as follows:

1. The opinion states: (A5-A6) **"It is clear on this record that the basic idea for these trusts was initiated by the settlor, not by the trustee . . ."**

If true, this statement is decisive of this case for the Bank. But not one word in the record supports this statement and the oral and documentary evidence to the contrary is overwhelming. Mayne, the Bank's Vice President, who admitted his fiduciary relation in the most emphatic terms, was asked: "Q. When you came to this *project*

of securing the million dollar Irrevocable Trust of January, 1962 from Mrs. Meyer you knew that it would be necessary for her to have independent legal counsel for that trust to be valid, did you not?" And he answered "A. I did." (Rec. 1009.) The letter addressed to Mayne that Goldsworthy (the attorney whom he had summoned) prepared and had her sign when she executed these trusts starts: "You and Mr. Goldsworthy have discussed with me for some time the advisability of an Irrevocable Trust." (AB Ex. 34, Rec. 234-6, 994-5.) Mayne was asked: "Q. The securing of such an Irrevocable Trust is a very desirable operation for a Bank, is it not?" And he answered "A. Yes." (Rec. 1009.) The Bank advertised to secure such trusts. (AB Ex. 29.) Mayne's first letter to Mrs. Meyer proposing the 1962 Irrevocable Trusts starts: "Several weeks ago *we talked to you* concerning the advisability of a gift in trust for the benefit of Richard and Claresa." (Emphasis supplied.) (AB Ex. 7, Rec. 72, 951.)

2. The opinion states: (p. A4) **"In the case at bar it is undisputed that the only gain or benefit to be realized by the trustee is its fee for administering the trust, and the first question that arises is whether this kind of 'benefit' is sufficient to give rise to the presumption. The law in this State is that under such circumstances there is no presumption."**

We submit that no court of last resort has ever before held a bank which emphatically admitted its fiduciary relation to a donor, as here, to be exempt from the law governing fiduciaries because its only gain was its fees. As we showed in our original brief (p. 23), these fees will amount in this case to something over $200,000 quite apart from the economic power and prestige that the aggregate

of such trusts gives to a bank. (See our original brief, pp. 9-10.) We cited three cases from other jurisdictions where courts have set aside irrevocable trusts to fiduciary banks where the only gain to the bank was its fees. (Our original brief, p. 23.)

We suggest that the language of this opinion will, in effect, issue a judicial license to banks in a fiduciary position to secure Irrevocable Trusts from aged persons without affording the donor the protection that the law has always given to such donors. We suggest that this language will arise to plague this Court in future cases.

The opinion bases this novel rule (p. A4) only on the analogy to the rule that no presumption of invalidity of a will arises when an attorney who draws a will names himself as executor. That rule has existed from the earliest times throughout the United States. Any other rule would raise a presumption against the validity of many, if not most, wills. That rule has never before been extended by analogy in any State to a fiduciary bank securing irrevocable trusts.

There is a vast difference between an executor acting for a short period of two or three years, with his compensation controlled by law and the Probate Court, and a bank as trustee of an irrevocable trust which acts for forty or more years, as in this case, and fixes its own fees.

And this Court has held that the necessary exemption of the lawyer-executor from the fiduciary rule cannot be applied to a lawyer who draws a will and names himself both as executor and as "trustee with large powers". *Gum* v. *Reep,* 1916, 275 Ill. 503, 511.

Suppose a fiduciary lawyer had drawn these Irrevocable

Trusts and named himself as trustee for a period of forty years or more with the broad sweeping powers here given and with the power to fix his own fees as in this case. Would he enjoy the exemption from the fiduciary presumption that the law gives to a lawyer naming himself as executor of a will? Will not this decision invite lawyers in a fiduciary position to name themselves as trustees instead of executors of wills? Would a lawyer be allowed an exemption from the fiduciary rule in naming himself as executor if he were allowed to advertise for executorships as banks advertise for trusts?

This opinion will make a sharp change in the practice of banks in this State. This decision will undoubtedly be widely commented upon by professional journals on Trusts. The larger banks will report it in the monthly brochures on Wills and Trusts that they issue to their customers.

If this decision is allowed to stand, it will relieve banks from their present practice of requiring a donor in an irrevocable trust to have independent legal counsel. The only reason for that practice is to overcome the presumption of invalidity arising from a fiduciary relation. This practice was shown by Mayne's own testimony. (Rec. 1009.)

If this decision is allowed to stand Illinois will be the only State where a fiduciary bank can get a trust where the donor had no independent legal counsel.

This decision will tend to end the drawing of trusts by lawyers. Banks will draw their own trusts without independent legal counsel if no presumption arises from their fiduciary relation because their only gain is their fees.

3. The opinion states: (p. A1) "**The counterclaim seeks**

to set aside both trusts together with a third one made in 1960, on the ground of undue influence on the part of the banks.''

This is wholly wrong. The words ''undue influence'' do not appear in the counterclaim. It charges only breach of fiduciary obligations. (Rec. C254-259.) This mistake runs throughout the opinion, which uses the words ''undue influence'' several times on pp. A1, A3 and A4 of the opinion.

This Court has several times held that the words ''undue influence'' are improper in this context. In *Thomas* v. *Whitney,* 1900, 186 Ill. 225, 230; *Beach* v. *Wilton,* 1910, 244 Ill. 413, 423; *Sharkey* v. *Sisson,* 1923, 310 Ill. 98, 102, this Court quoted with approval from Pomeroy's Equity Jurisprudence: ''Nothing can tend more to produce confusion and inaccuracy in the discussion of the subject than the treatment of actual undue influence and fiduciary relation as though they constituted one and the same doctrine''. In *Clark* v. *Clark,* 1947, 398 Ill. 592, 602, this Court said, ''In cases where the evidence shows a fiduciary relation neither undue influence nor mental incapacity is necessary to be established in order to avoid the transaction.''

The assumption throughout this opinion that appellant's counterclaim charges ''undue influence'' erroneously throws the burden on her to prove it. Actually the burden is entirely on the Bank as a fiduciary to remove all reasonable doubt and suspicion on that score. (See our original brief, p. 11.)

Mayne far surpassed Mrs. Meyer in health, education and business experience. (Rec. 8-10, 918-9.) He admitted that she trusted him and had confidence in him and that he

accepted her trust and confidence. (Rec. 53, 54, 919-920.) He even bought stocks for her without consulting her. (CNB. Ex. 402.) The major portion of her assets were held by the Bank in a 1946 Revocable Trust. (AB Ex. 4.) Mayne admitted that he and the Bank were in a fiduciary relation toward her and were bound to exercise the "utmost good faith" in dealing with her. (Rec. 53-4, 420.)

Under these facts appellant had no duty to prove "undue influence" as this opinion declares. The Bank must remove all reasonable suspicion of it. That it has failed to do.

4. The opinion states: (p. A2) **"The evidence shows the settlor to have been a capable woman in the management of business affairs, having long experience in dealing with her stocks and other investments."**

In view of its past tense we cannot question this statement. However, it ignores the chronology of the case. The testimony of the Bank's own witnesses raised powerful doubts whether this statement was true in 1960 and 1962 when these trusts were executed. She died utterly confused in February, 1964 of arteriosclerosis, a progressive disease which had been diagnosed on her hospital record as early as 1950. (AB Ex. 76.) In 1963 her doctor, the Bank's own witness, stated over his signature on her hospital record: "Patient has been noted to become senile in the past *several years.*" (Emphasis supplied.) (AB Ex. 49.) The Bank's doctor, who signed this statement, testified "Senility is a medical term indicating a condition of the mind as a result of age". (Rec. 1087.) Two other doctors signed this statement. The Bank's own witness, Merritt Meyer, testified that, two weeks before the execution of the 1962 Trusts, his grandmother had been mentally declining in her old age "for some time". (Rec. 575, 578.)

The records of the Bank's own doctor witness confirmed the testimony of appellant, a physician, that her mother started to have small strokes in 1958 which continued until her death. She had a couch put in her kitchen so that she could lie down when she had these strokes. (AB Ex. 72, Rec. 255-6.)

The appellant produced eight large uncashed checks aggregating $1,780.00 payable to her mother's order dated in the ten years before her death which were found scattered among her effects after her death. (AB Ex. 54, A, B, C, D, E, H, I, AB Ex. 15, 100, 120 Rec. 261, 1960-1961.)

In October, 1959 decedent borrowed $12,000 from the Bank at 5% (Rec. 700) with which the Bank let her subscribe for 4% U. S. Bonds, making five officers of the Bank alternate payees. (AB Ex. 25, A, B, C, D, E.) That subscription was completed in the Bank by one of the alternate payees (Rec. 744, 759) and the trial court excluded the documentary evidence of the effort of the Bank's attorney to get these bonds on her death for the alternate payees. The attorney for the Bank sent to each of the alternate payees a copy of his letter to the appellant's attorney demanding these bonds for the alternate payees. (AB Ex. 26.) The alternate payees did not then reject the gift. However, they did reject the gift after the Chairman of the Bank's Board apparently discovered that a Federal statute makes it a crime punishable by one year in the penitentiary and a $5,000 fine for an officer of a bank to accept a gift from the proceeds of a loan. (U. S. C. A. Title 18, Chapter 11, Sec. 220; AB Exs. 26, 27, 28.)

The Bank found it necessary to take over the control of her business affairs including the collection of her rents

and her writing of checks immediately after the execution of the Irrevocable Trusts of 1962. (AB Exs. 58, 61-69, inc.) Her daughter wrote the President and Vice President of the Bank in April, 1962 that her mother was "slipping", but protested that the Bank had stopped her mother from writing small checks for things that she bought and that such check-writing was a form of therapy. (AB Exs. 19, 20, 18, 17.) Her mother had wept because she was not permitted to write *any* checks. (Rec. 1712-13.)

Practically all of the Bank's testimony relates to her condition prior to August, 1961 when she last came to the bank. On the other hand, appellant's witnesses saw her in November, 1961. (See testimony of Mary Hastings Bradley, Rec. 624-633.) By this time her senility was far advanced. Although she had attended the funeral of her son-in-law, Dr. Howard Armstrong, in March of 1961, by November she did not know that he was dead. She had her dinner and a few hours later forgot that she had had it.

There is substantially no conflict in the material evidence in this case. The great bulk of the appellant's evidence was documentary and admissions of the Bank and its witnesses. The sole question here is a legal issue: Upon whom is the burden of proof when a Bank admits in the most emphatic language that it was in a fiduciary relation to a donor from whom it secured a million dollar Irrevocable Trust. If that burden is upon the appellant as this Court holds because the Bank's only gain was its fees, the appellant has clearly failed to sustain that burden. But 66 decisions of this Court have held that the burden is upon the fiduciary to remove all reasonable doubt that the donor understood the transaction and that she had a competent, independent adviser. The Bank has clearly failed to sustain that burden.

5. The opinion states: (p. A1) **"The settlor, . . . had been divorced from her husband in 1933 . . ."**

There is no evidence in the record of any such divorce.

6. The opinion states: (p. A1) **"The 1960 trust was set up primarily for the settlor's grandchildren . . ."**

This is not correct. It is a trust for three of the four children and the after-born children of her son Richard, omitting entirely a child from whom Richard was alienated. (Rec. C261-270.) Mayne testified that Mrs. Meyer said to him: "Mr. Mayne, I love my grandchildren as much as I do my children." (Rec. 1635.) However, this trust deliberately omits a beloved grandchild. (Rec. 1244, 1251.) This omission was one of many factors indicating that Mayne and Richard Meyer collaborated in securing that $750,000 trust from this aged lady. (See our original brief, p. 35.)

7. The opinion states: (p. A2) **"She was an active director of the Central National Bank until its consolidation with the appellee bank in 1961."**

Since she was the largest stockholder in the Central National Bank and the law requires cumulative voting, she could not be excluded as a director of that Bank. She had no activity as a director except to attend meetings and the evidence is that she said very little at directors' meetings. (Rec. 1385, 1395.) She broke down and cried when she was told in December, 1960 that she could not remain a director after the consolidation. (Rec. 275.) The negotiations for the consolidation had been going on for many months prior to December, 1960 and never in the course of those negotiations was she even considered for a possible directorship in the consolidated Bank. (Rec. 1015.)

8. The opinion states: (p. A2) **"In 1959 she discussed with Frank Mayne, vice president of the bank, the question of making gifts in trust and she told him she wanted to create a trust for her grandchildren. Several conferences followed in which her attorney Elliott participated, and on January 7, 1960, the trust was executed by the settlor in the presence of both Elliott and Mayne."**

This is not correct. Mayne testified that one day, she told him that she wanted to make some "gifts" to her grandchildren. (Rec. 1635.) He then suggested the $750,000 Irrevocable Trust. The Record is completely barren of any evidence that she told him "she wanted to create a trust for her grandchildren." Actually he had her sign a trust for three of her four grandchildren.

There is no evidence whatever in the Record that "several conferences followed in which her attorney, Elliott, participated". The trust was drawn by the Bank's Chicago attorneys, Gardner, Carton, on instructions from Mayne. (See our Reply Brief to Bank's Brief, pp. 5-8.) She never had any contact with anyone in that firm, (Rec. 55-6, 833-4, 932, 948). Gardner, Carton apparently told Mayne that the trust would not be valid unless she had independent legal counsel. (See our original Brief, p. 37.) Mayne then called Elliott, the attorney for the Bank, into Elliott's first conference with her on this trust and preserved for the Bank's files Mayne's private, self-serving memorandum of that conference. This was the only conference shown by the record that Elliott ever had with her on the subject. (Rec. 938-9, CNB. Ex. 144.) This memorandum is the only paper in the Bank's files indicating that Elliott had any connection whatever with this trust. It is the only such memorandum in the Bank's files. According to Mayne's memorandum, Elliott

argued against her making a trust with stocks on which she had almost a zero tax base, thus freezing that base. (CNB. Ex. 144.)

9. The opinion states: (p. A2) **"In the summer of 1961 the settlor discussed with Mayne the matter of gifts in trust to her son and daughter, and several alternative plans were prepared by the Bank."**

The Record shows that the alternative plans were prepared by the Bank and discussed with Gardner-Carton before these trusts were discussed with her. (See Chronology in our original Brief, p. 43.) As we have shown (*supra*, pp. A9-10), the documentary evidence is overwhelming that the discussion of these trusts was initiated by the Bank and not by Mrs. Meyer.

10. The opinion states: (p. A2) **"At that time [summer of 1961] she decided to employ Attorney Boyd Goldsworthy, who had long known the son Richard and had done legal work for him through the years, to draw the trust."**

At that time she was paying John M. Elliott a semi-annual retainer as her attorney, as she had been doing for 45 years. (Rec. 270.) The Bank knew that Elliott would advise her against putting these almost zero based stocks into an Irrevocable Trust, thus freezing that base. According to Mayne's private memorandum Elliott had so advised her on the 1960 trust. (Rec. 938-9, CNB. Ex. 144.) For several years her son Richard had been campaigning to have her discharge John M. Elliott as her attorney and employ in his stead Richard's friend, Goldsworthy. (Rec. 273-4, 858-9, 857, 870.) By December 1960 the Bank had decided to "get rid" of John M. Elliott as its attorney. (Rec. 275.) Mayne joined Richard in his campaign to supplant Elliott with

Goldsworthy as her attorney. Early in 1961 Richard, Mayne and Goldsworthy "together planned" for Goldsworthy to get her taxes reduced on her real estate which Richard had managed for her for several years. (Rec. 858-9.) As such manager, Richard employed Goldsworthy to represent his mother for this purpose, but Goldsworthy never had any personal contact with Mrs. Meyer regarding this tax case. (Rec. 213-4, C 364.). Mayne testified for Goldsworthy and Richard on this case before the Board of Review. (Rec. 205.)

In December, 1961 Mayne, at Richard's request, prepared a letter for Mrs. Meyer to copy terminating John M. Elliott's retainer as her attorney. (AB Ex. 2.) When confronted with this letter on deposition, Mayne denied all knowledge of it. (Rec. 64-5 and see Mayne's original deposition in the last volume of the Record.) But the letter was written on Mayne's typewriter and on his water-marked paper and bore Richard's handwriting and Richard was forced to admit that Mayne had prepared it at Richard's request. (Rec. C 721, 870-2.) Richard took Mayne's letter to his mother's hotel room and had her try to copy it. She could not copy it correctly. But this done, Richard marked Mayne's copy "sent December 29" and took her garbled handwritten copy from her and mailed it. (AB Ex. 31, Rec. 870-2.) She wept for a long time after his departure. (Rec. 576.)

We submit that under these circumstances the Bank has not sustained the burden that the law imposes on a fiduciary to remove all reasonable suspicions regarding a transfer of property to a fiduciary by an aged person.

11. The opinion states: (p. A5) ". . . **There is nothing to show that a conspiracy or plan existed on the part of the**

son, Goldsworthy and Mayne to cause the dismissal of Elliott as Mrs. Meyer's attorney.''

This conspiracy or plan between Richard and Mayne is proved by irrefutable documentary evidence. There is in the Record (AB Ex. 2) a letter discharging Mr. Elliott written on Mayne's typewriter and on his water-marked stationery (of which he denied all knowledge) but which contains Richard's handwriting and which Richard was forced to admit that Mayne prepared at his request. (*Supra,* p. A20.)

The counterclaim did not charge, and there is no *direct* proof, that Goldsworthy was a party to this conspiracy.

12. The opinion states: (p. A3) ". . . **the appellant argues that a fiduciary relationship existed between the bank and the settlor, that the latter was in a senile condition and did not understand the trusts and that the Bank 'secured' the trusts through a presumed exercise of undue influence''.**

As we have shown, neither the appellant's pleadings nor any argument by appellant have ever charged the Bank or anyone with "undue influence". (*Supra,* pp. A13-14.) And this Court has several times declared that the words "undue influence" are inappropriate and confusing in this context. (*Supra,* p. A13.) The donor's senile condition was admitted by the Bank's own witnesses and proved by overwhelming evidence. (*Supra,* pp. A14-16.) The Record shows conclusively that the donor did not understand these trusts: She could not tell her daughter why the Bank was given complete discretion to withhold one half of the income from her daughter's trust. (Rec. 282.) She said she was "amazed" and did not know the trust was "that way" when her daughter

told her that she could not dispose of the corpus of her trust by her will as her mother had told her she could. (Rec. 284-5, 475-6.)

13. The opinion states: (p. A3) **"It is asserted that the settlor did not have independent advice in private, and the proposition is advanced that in order to avoid a finding of undue influence under the present circumstances it must be shown that the donor privately consulted a competent, independent adviser."**

Again we call attention to the fact that neither in our pleadings nor in our argument have we ever charged "undue influence" or advanced any "proposition" about avoiding a finding of undue influence. (*Supra,* pp. A13-14.) We have never sought "a finding of undue influence". We have called attention to the 66 decisions of this Court setting aside transfers to fiduciaries (34 of them reversing the lower court) on the ground that the fiduciary had not overcome the presumption of invalidity arising from such transfers. These cases hold that a fiduciary securing a conveyance to itself must by clear and convincing evidence remove every reasonable suspicion regarding it. (See our original Brief, p. 11.)

14. The opinion then states: (p. A3) **"We are aware of no rule of law which deems the transfer fraudulent whenever there has been no private consultation with an independent adviser."**

The decisions make it abundantly clear that a transfer to a fiduciary need not be "deemed fraudulent" in order to set it aside. See *Roby* v. *Colehour,* 1890, 135 Ill. 300, 329, "This prohibition operates irrespectively of the good faith or bad faith of such dealings"; *McDonnell* v. *Holden,* 1933,

352 Ill. 362, "This is true regardless of the existence of actual fraud, undue influence or coercion." *Commercial National Bank* v. *Kloth,* 1935, 360 Ill. 294, 306, "It is not essential that the appellants show fraud but under the foregoing and other authorities it is essential that good faith be shown by the appellees." *Kosakowski* v. *Bagdon,* 1938, 369 Ill. 252, 255, "We have often held that where a fiduciary relation exists and gives cause for suspicion, it is not necessary to prove actual fraud in order to vitiate a questioned action." *Schueler* v. *Blomstrand,* 1946, 394 Ill. 600, 613 "Actual and intentional fraud need not be established in order to set aside a deed where a fiduciary relation exists."

We cited in our original brief three cases where courts have set aside Irrevocable Trusts to banks because of the confidential or fiduciary relation and in each case have emphatically stated that they did not find that the bank had been guilty of fraud, misconduct or any improper action. *Harrison* v. *City National Bank of Clinton,* 1962, 210 Fed. Supp. 362; *Bullock* v. *Lloyds Bank,* Law Reports, 1955, 1 Ch. 317; *Beard* v. *Beard,* 1917, 173 Ky. 131, 190 S. W. 703.

In 19 cases this Court has set aside a transfer to a fiduciary because the donor had no competent, independent adviser. *Hofert* v. *Lattori,* 1961, 22 Ill. 2d 126, 132; *McFail* v. *Braden,* 1960, 19 Ill. 2d 108, 119-20; *Works* v. *McNeil,* 1953, 1 Ill. 2d 47, 52-3; *Curtis* v. *Fisher,* 1950, 406 Ill. 102, 109; *Dombrow* v. *Dombrow,* 1948, 401 Ill. 324, 333; *Krieg* v. *Felgner,* 1948, 400 Ill. 113, 122; *Clark* v. *Clark,* 1947, 398 Ill. 592, 604; *Davis* v. *Brickey,* 1947, 397 Ill. 556, 565; *Schueler* v. *Blomstrand,* 1946, 394 Ill. 600, 611; *Fisher* v. *Burgiel,* 1943, 382 Ill. 42, 53; *Seely* v. *Rowe,* 1939, 370 Ill. 336, 341; *Kosakowski* v. *Bagdon,* 1938, 369 Ill. 252, 257; *Rutherford* v. *Schneider,* 1923, 307 Ill. 28, 31; *Hensan* v. *Cooksey,* 1908,

237 Ill. 620, 626; *Fish* v. *Fish,* 1908, 235 Ill. 396, 404; *Gilmore* v. *Lee,* 1908, 237 Ill. 402, 412; *Thomas* v. *Whitney,* 1900, 186 Ill. 225, 231; *White* v. *Ross,* 1896, 160 Ill. 56, 71-2.

However, we have never argued that there must be such a competent, independent adviser to sustain every transfer to a fiduciary. The case of *Boryca* v. *Parry,* 1962, 24 Ill. 2d 320 cited in the opinion (pp. A3-4) seems to us far afield. In that case a mother and daughter went to a lawyer whom neither of them had ever met and requested him to prepare a deed from the mother to the daughter. This Court sustained the deed although the daughter was a technical fiduciary and was present when the attorney prepared the deed. This Court said: (p. 329) "Nowhere in the record does it appear that she [the mother] suffered from either mental or physical impediment which would affect her ability to know and comprehend the nature and effect of the documents she executed." The opposite is true in the case at bar.

The Bank admits that these Irrevocable Trusts would not be valid unless the donor had independent legal counsel (Rec. 1009) and claims that Goldsworthy qualifies under the decisions of this Court as the donor's competent, independent adviser in the creation of these trusts. It is clear, however, that Goldsworthy cannot fall within this Court's definition of a competent, independent adviser. In *Clark* v. *Clark,* 1947, 398 Ill. 592, 604, this Court rejected the contention that an attorney who had drawn a deed to a fiduciary satisfied the requirements of the law as a competent, independent adviser. This Court said that he had acted only as a scrivener. Goldsworthy admitted that he acted only as a "draftsman" of these Irrevocable Trusts. (Rec. 222.) He admitted that he knew nothing whatever about the donor's finances.

(Rec. 223-225.) He did not inquire and did not know that she had almost a zero tax base on the stocks that were put into these Irrevocable Trusts. That tax base would be frozen in the trust. Goldsworthy could not qualify as her competent, independent adviser. He was only the draftsman of this trust. (Rec. 222.)

Another decision of this Court (*Dombrow* v. *Dombrow*, 1948, 401 Ill. 324) also makes it clear that Goldsworthy cannot qualify as the donor's competent, independent adviser in this case. In that case this Court said "Without commenting at length on the role of the witness Schalk, *who was evidently inserted in the picture to make it appear that appellee had the benefit of independent advice,* we are of the opinion, from an analysis of his testimony, that he was scarcely such an informed and competent adviser, as would enable the fiduciary to meet the burden of proof." (p. 333.) (Emphasis supplied.) Goldsworthy testified that Mayne told him at the time that the Irrevocable Trust would not be valid unless Mrs. Meyer had independent legal counsel. (Rec. C 361.) Goldsworthy was brought in by the Bank to meet that legal requirement. Can a lawyer brought into the picture by a bank for that purpose be independent? This Court has held that he cannot be what the law contemplates as a competent, independent adviser. (*Dombrow* v. *Dombrow, supra.*) What chance would any lawyer brought into a situation such as this by a bank have to give independent advice to the donor? The bank brought him to draw the trust to it and he drew it. That is clearly not what the decisions of this Court contemplate as a competent, independent adviser.

Goldsworthy never saw Mrs. Meyer privately regarding these Irrevocable Trusts. He had only three short meet-

ings with her on the subject. Each time Mayne arranged the appointment and remained with Goldsworthy and Mrs. Meyer throughout. (Rec. 232-233.) What chance would a lawyer have to give independent advice under such circumstances? The law is clear that an independent adviser must see the donor privately. Five States, a Federal Court and an English Court have expressly so declared. (See our original brief, pp. 31-34.) This Court has never heretofore had occasion to lay down this requirement but in every case where it has sustained a transfer to a fiduciary because the donor had a competent, independent adviser, it has noted particularly that the adviser did see the donor privately and out of the presence of the fiduciary. (See 7 Illinois cases cited in our original brief, p. 34.)

The opinion in this case ignores entirely Goldsworthy's disqualifications as a competent, independent adviser. The Bank admitted of record that without such an adviser these trusts would not be valid. (Rec. 1009.) The opinion limits itself to the statement that the law does not require that the donor to a fiduciary have a private consultation with an independent adviser in all cases. (Opinion, p. A3.) That we admit. But 19 decisions of this Court have set aside transfers to fiduciaries because the donor had no competent, independent adviser. And the Bank here expressly admitted that these trusts would not be valid unless the donor had independent, legal counsel. (Rec. 1009.)

15. The opinion states: (p. A5) **". . . nor are the repeated references to the settlor as a 'senile donor' substantiated by the evidence. Her physical and mental condition described by some 28 witnesses, including her family**

physician, social friends, employees and fellow board members of the bank, and others was found adequate to enable her to understand the trusts, and such finding is amply sustained by the testimony.''

Under the law appellant was not required to ''substantiate'' her mother's senility. The burden was on the Bank as fiduciary to remove all reasonable doubt of it. And we suggest that the signed declaration by the Bank's own doctor witness, her family physician, made before any question in this case arose, ''Patient has been noted to become senile in the past several years'' (AB Ex. 72) and other documentary evidence (*supra,* pp. A14-16) cannot fail to leave a residue of doubt on that subject. The 28 witnesses consisted largely of employees and directors of the Bank. They testified to her legal competency and not to her non-impairment. Some of them admitted her mental impairment. (Rec. 575, 508, 1270, 1160.) None of them was able to give any foundation for his opinion by stating anything rational that she said or did after 1959. The law is well established that before a witness can testfy to a personal's mental condition he must state the facts showing the basis for his opinion. Opportunity for observation, standing alone is no such basis. Just as a witness to incapacity must state the facts showing irrational conduct as a basis for his opinion so the witness to rationality must state what the subject said or did that was rational (*Morecraft* v. *Felgenhauer,* 1931, 346 Ill. 415, 422.) Without that foundation an opinion has no weight whatever. (*Lloyd* v. *Rush,* 1916, 273 Ill. 489, 498.) None of these witnesses gave any such foundation for his opinion.

We submit that in justice to itself, to the banks of this State and to future generations of litigants, this Court should allow a rehearing of this case.

Respectfully submitted,

KING, ROBIN, GALE & PILLINGER,
ROBERT L. BURHANS,
Attorneys for Appellants.

WILLARD L. KING,
ROBERT L. BURHANS,
DOUGLASS PILLINGER,
J. WILLIAM BRAITHWAITE,
Of Counsel.

ORDER OF THE SUPREME COURT OF ILLINOIS, DATED MAY 27, 1969.

And now, on this day, the Court having duly considered the petition for rehearing filed herein, and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies a rehearing in this cause.

APPENDIX C.

MOTION PRESENTED, AFTER SERVICE ON JULY 1, 1969, TO JUSTICE DANIEL P. WARD ON JULY 8, 1969.

Now comes the Appellant by King, Robin, Gale & Pillinger and Robert L. Burhans, her attorneys, and moves the Court to recall its mandate in this case and reconsider its Order denying a rehearing herein, on the ground that the decision denies the Appellant due process of law as guaranteed to her by the Fourteenth Amendment to the Constitution of the United States, in accordance with the affidavit of Willard L. King and the Memorandum of Authorities hereto attached.

The opinion in this case is novel since no other Court in any State has ever before held that banks in securing irrevocable trusts from persons towards whom they are in a fiduciary position are exempt from the laws governing fiduciaries because their only gain is their fees. The rule laid down by this opinion will be of great advantage and profit to the banks of Illinois. It directly affects all banks in Illinois having trust powers as though they were parties to this suit.

As set forth in the attached affidavit, the Justice who wrote the opinion in this case and two other Justices of this Court were, at the date of said opinion, stockholders and directors of certain banks in this State having trust powers. Consciously or unconsciously, they were interested in the

outcome of the case. The decision in this case therefore denies Appellant due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States. (See Memorandum hereto attached.)

In the alternative Appellant moves the Court to recall its mandate in this case pending the filing by Appellant of a petition for certiorari to the Supreme Court of the United States which Appellant will file in apt time.

KING, ROBIN, GALE & PILLINGER,
ROBERT L. BURHANS,
Attorneys for Appellant.

AFFIDAVIT.

STATE OF ILLINOIS
COUNTY OF COOK } ss.

Willard L. King, being first duly sworn, deposes and says:

That the Appellant's Petition for Rehearing in this case was denied by this Court on May 27, 1969 and the mandate of this Court issued on June 6, 1969 and the mandate of the Appellate Court issued on June 12, 1969.

That on June 10, 1969 a document was filed in this Court in the case of *People* v. *Isaacs*, No. 39797, charging that the Justice of this Court who wrote the opinion for the Court in that case had accepted a gift of 100 shares of stock, of the value of $2,000, of Civic Center Bank and Trust Company of Chicago.

The House of Representatives of the State of Illinois thereupon on June 12, 1969 adopted House Resolution 249 under which a bi-partisan committee of leading Representatives was appointed to investigate the charges aforesaid "and any other matters relating to judicial impropriety."

This Court thereupon on June 16, 1969 made an Order appointing a committee of distinguished lawyers to investigate the said charges "in so far as they relate to the integrity of the judgment entered by this Court" in the Isaacs case.

In the course of these developments, Appellant and her attorneys learned for the first time that on the date of the opinion herein:

1. Chief Justice Roy J. Solfisburg of this Court was a stockholder and director of St. Charles National Bank of St. Charles, Illinois, a bank having trust powers.

2. Justice Robert C. Underwood of this Court was a stockholder and director of First National Bank of Normal, Illinois, a bank having trust powers.

3. Justice Ray I. Klingbiel of this Court, who wrote the opinion in this case, was a stockholder and director of State Bank of East Moline, Illinois, a bank not having trust powers and he, or members of his immediate family, were stockholders in Civic Center Bank and Trust Company of Chicago, a bank having trust powers.

None of the foregoing facts were known to Appellant or her attorneys until after the appointment of the Committee of the Illinois House of Representatives as aforesaid.

WILLARD L. KING.

Subscribed and sworn to before me, a notary public, this 1st day of July, 1969.

EDITH K. ANDERSON,
Notary Public.

MEMORANDUM OF AUTHORITIES.

In re Murchison, 1955, 349 U. S. 133 involved the question of whether due process was violated where the Judge presiding at a contempt hearing had also served as a "one man grand jury" out of which the contempt charges arose. On certiorari the Supreme Court reversed the Supreme Court of Michigan. The Supreme Court of the United States said:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.' *Tumey* v. *Ohio,* 273 U. S. 510, 532. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' *Offutt* v. *United States,* 348 U. S. 11, 14."

In *Tumey* v. *Ohio,* 1927, 273 U. S. 510, the Supreme Court reversed the Supreme Court of Ohio where the Mayor of

the village who tried the defendant for a minor offense received $12.00 in costs imposed by the judgment. In a unanimous decision by Chief Justice Taft, the Supreme Court said: "That officers acting in a judicial or quasi judicial capacity are disqualified by their interest in the controversy to be decided, is, of course, the general rule. (citing cases) Nice questions, however, often arise as to what the degree or nature of the interest must be."

The Court stated that at the common law ". . . it is very clear that the slightest pecuniary interest of any officer, judiciary or quasi judiciary, in the resolving of the subject matter which he was to decide rendered the decision voidable."

The Supreme Court held, however, that the pecuniary interest of the Mayor in this case "is not the only reason for holding that due process of law is denied to the defendant here." The Supreme Court pointed out that, since the village received a portion of the fine imposed, the trial before its Mayor was a denial of due process. "With his interest, as Mayor, in the financial condition of the village, and his responsibility therefor, might not a defendant with reason say that he feared he could not get a fair trial or a fair sentence from one who would have so strong a motive to help his village by conviction and a heavy fine?"

The Court concluded: "A situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, necessarily involves a lack of due process of law . . ."

In the case of *In re Honolulu Consol. Oil Co.*, 243 Fed. 349, the Circuit Court of Appeals for the 9th Circuit issued a mandamus to compel a District Court Judge to cer-

tify his disqualification to try a civil case against an oil company where the Judge (although not having any interest in the case then at bar) was a stockholder in another oil company against which the Government planned to file a similar suit. The Circuit Court based the decision upon *North Bloomfield G. M. Co.* v. *Keyser,* 58 Cal. 315, where it was held that a Judge was disqualified to try a case involving flooding of land on a river by the defendant's mining operations. The Judge in question had no interest in the land involved in the suit. However, he was the owner of land "equally affected by the mining operations complained of". The Court said:

> "It is an ancient maxim, and one founded in the most obvious principles of natural right, that no man ought to be a Judge in his own case . . . 'The Court ought not to be astute to discover,' said the Supreme Court of Michigan in *Stockwell* v. *Township Board of White Lake,* 22 Mich. 350, 'refined and subtle distinctions to save a case from the operation of the maxim, when the principle it embodies bespeaks the propriety of its application. The immediate rights of litigants are not the only objects of the rule. A sound public policy, which is interested in preserving every tribunal appointed by law from discredit, imperiously demands its observance.' "

KING, ROBIN, GALE & PILLINGER,
ROBERT L. BURHANS,
Attorneys for Appellant.

ORDER OF THE SUPREME COURT OF ILLINOIS DATED JULY 8, 1969.

On Motion of the Appellant to recall the mandate in this case and reconsider the order denying a rehearing herein or, in the alternative to recall the mandate pending the filing by Appellant of a Petition for Certiorari to the Supreme Court of the United States and on objections to said motions by the Appellees and upon the stipulation of the Appellees that no further steps will be taken under the mandate herein in the Circuit Court of Peoria County until the ruling of this court upon said motions, it is ORDERED that said motions and objections be taken under consideration by the entire Court.

DANIEL P. WARD.

ORDER OF THE SUPREME COURT OF ILLINOIS DATED JULY 17, 1969.

And now, on this day, the Court having duly considered the motion by Appellant to recall mandate and to reconsider the order denying petition for rehearing, or, in the alternative, to recall and stay the mandate pending disposition of petition for writ of certiorari in the Supreme Court of the United States, and being now fully advised of and concerning the premises;

IT IS HEREBY ORDERED that the motion by appellant to recall mandate and to reconsider the order denying petition for rehearing be, and the same is, denied. It is further ordered that the part of the motion to recall and stay the mandate pending disposition for writ of certiorari in the Supreme Court of the United States be, and the same is, allowed.